

## Disciplinary Note

Attorney A represented Client D in a criminal proceeding being prosecuted by Attorney B. The crime charged was criminal sexual penetration. D was free on bond pending trial and, with the court's permission, attending school in another county. Motions had been filed and argued, and a date for trial had been set.

Approximately two (2) months before the scheduled trial, B was notified by the State Crime Laboratory that a "rape kit" obtained from the alleged victim (six months previously) contained samples that might be utilized if comparison samples were obtained from D. B took no action for several weeks and then, after conferring with a supervisor (Attorney C) decided to seek a search warrant to obtain blood, hair, and saliva samples from D.

Attorney B prepared the Affidavit for Search Warrant and personally presented it to the judge before whom the case was pending, who issued the warrant. No notice of either the application for or the issuance of the search warrant was given to Attorney A. Attorney B then accompanied a police officer and a nurse to the neighboring county, where local police officers were dispatched to find D; he was located and directed to follow the policemen to the station.

Upon his arrival, D was confronted by Attorney B. The following conversation ensued:

Client D: What's this about?

Attorney B: It's about the case against you in (neighboring town.) I have a warrant here, and you must provide certain blood, hair, and saliva samples.

Client D: Can I call my lawyer (Attorney A) to see if I should do this?

Attorney B: No. This is an order of the Court, and you have to comply with it. You can call your attorney after you have given the samples.

D feared that he would be arrested and held at the police station if he failed to cooperate, so he allowed the nurse to collect the samples. A copy of the warrant was given to D when the samples had been obtained. No further conversation occurred between B and D.

During the investigation, which was conducted after a complaint against Attorney B was filed by Attorney A, Attorney B contended that the actions taken were necessary in view of the rapidly approaching trial date and the fact that any notice to Attorney A would have resulted in attempts to thwart B's efforts to obtain and test the necessary evidence in time for trial. A hearing officer who reviewed the file directed that charges be brought against Attorney B; at the insistence of Attorney C, he was joined as a respondent in the charges.

A two-day hearing was held, and the hearing committee found that Attorney B's conduct did not violate Rules 7-101(A)(1) or 7-110 (B) of the former Code of Professional Responsibility but was violative of Rule 7-104 (A) (1), which prohibits an attorney from conversing with a represented adversary about the subject matter of the representation unless opposing counsel has given prior consent or the communication is otherwise authorized by law. (See present Rule 16-402, SCRA 1986.) The committee recommended that Attorney B receive a letter of caution for this conduct but that Attorney C not be disciplined.

A panel of the Disciplinary Board was then appointed to review the record. After oral argument was held, the panel determined that the case should be dismissed against both Attorney B and Attorney C. The panel's conclusions and its reasoning follow and, it is hoped, will provide some guidance to prosecutors facing similar situations in the future.

## "Integrated Bar"

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their practice (governmental or non-governmental). With that data available, we will be able for the first time to identify the size of the various segments of the Bar.

Secondly, I have appointed three task forces to study these issues. The task force on the involvement of minorities in the profession is chaired by Arturo Jaramillo of Santa Fe. Sarah Singleton, also of Santa Fe, is chairing the task force studying women in the profession, while Mark Jarmie of Albuquerque is chairing the task force on the involvement of governmental lawyers in the Bar.

**Question:** What will these task forces be doing?

**Cuddy:** The basic function of each of these task forces is to identify the portion of the Bar that falls within the group represented by the task force, identify the degree to which the members of that group have participated in or benefited from Bar activities, identify any barriers to full integration of those groups into the Bar, and to suggest programs for removing those barriers or otherwise improving the integration of each group into the Bar. Obviously, as they begin their work, the task forces will refine the focus of their inquiries, and we may see some surprises with regard to the directions that they take.

**Question:** When do you expect the task forces to report their findings?

**Cuddy:** I have not given the task forces any particular deadline, recognizing that the lawyers who are participating are volunteers and also that each task force may need a very different amount of time to complete its work. It is my hope, however, that all of the task forces will have completed their work and reported to the Board of Bar Commissioners by the 1989 Convention. I would expect that at least one of the task forces will complete its work and make its report by the end of my term as president.

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**Conclusions of Law**

1. The actions of the Attorneys B and C in obtaining a search warrant rather than proceeding by motion to obtain evidence from the person of Client D did not violate Rule 701-1(A)(1) or any other provision of the Code of Professional Responsibility.

2. Neither the decision to proceed by search warrant nor any other decision made by Attorney B and C and relevant to this matter was made to harass or otherwise violate the Code of Professional Responsibility.

3. The actions of Attorney B and C in making and authorizing respectively ex parte contact with Judge X in order to obtain the search warrant and in failing to provide Attorney A with a copy of the Affidavit in support of the search warrant did not constitute a violation of Rule 7-110(B) nor of any other provision of the Code of Professional Responsibility.

4. The actions and authorizations of actions by Attorneys B and C respectively regarding delivery of a copy of the search warrant to Client D, the filing of a copy of the search warrant with the Court, and the failure to provide a copy of the search warrant to Attorney A do not constitute a violation of the Code of Professional Responsibility.

5. Attorney B's presence and Attorney C's authorization of Attorney B's presence during the service and execution of the search warrant for purposes of advising a police officer with respect to the service and execution of the warrant did not constitute a violation of the Code of Professional Responsibility.

6. Attorney B's actions in identifying Client D and in answering his questions by advising him that he would not be allowed to speak with his counsel until after the search warrant had been executed at the police station did not constitute a violation of Rule 7-101(A)(1). The use of a search warrant in this case and the manner in which it was served and executed including the participation therein by Attorney B were "reasonably available means permitted by law and the Disciplinary Rules" and did not constitute offensive tactics, discourtesy or lack of consideration for the persons involved therein. As set forth in more detail below, the record indicates that Attorney B was professional in the contact with Client D at the time of the service and execution of the warrant, and answered his inquiries in an accurate manner and in a manner authorized by law.

7. Attorney B's actions and communications with Client D during the service and execution of the search warrant did not constitute a violation of Rule 7-104(A)(1). The undisputed facts reveal that Attorney B identified Client D to the police officer and the nurse so that they could serve and execute the search warrant. The undisputed facts further reveal that D asked Attorney B "What this was all about" and that B advised him that it was about the case filed against him in (neighboring town.) B further advised D that they had a search warrant for blood, saliva, and hair samples. The undisputed record further reveals that D then asked Attorney B if he could call Attorney A to see if he had to submit to the search warrant, whereupon B stated that it was an order of the Court and that he would have to comply; and that he could call his lawyer after the search, if he wished. The record further reveals that no other statements were sought or obtained from D.

These communications by Attorney B were on the subject of the representation and were with a party whom Attorney B knew to be represented by Attorney A in that matter. Furthermore, Attorney B did not have the prior consent of Attorney A to make such a communication with Client D. However, in this instance, it is the opinion of the Panel that Attorney B's words and

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## Flaschner Award Nominations Being Accepted

Nominations for the 1988 Flaschner Judicial Award are being accepted through April 15. The award is bestowed annually on a judge of a special or limited jurisdiction court by the National Conference of Special Court Judges (NCSCJ).

"The recipient of this award is expected to have the high ideals, personal character and judicial competence exemplified by the late Chief Justice Franklin N. Flaschner of the District Court of Massachusetts, a state and national leader in improving the quality of justice in special courts and in judicial education," said Judge Robert S. Carr of Charleston, S.C., chairman of NCSCJ, a component of the American Bar Association's Judicial Administration Division.

Any judge of a special or limited jurisdiction court is eligible. Special courts handle about 90 percent of the cases in state and federal court systems and have a wide variety of titles, including city, municipal, county,

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## Important Notice MCLE Committee Has New Address and Phone Number

The Minimum Continuing Legal Education Committee of the Supreme Court of New Mexico announces the following change of address and telephone number effective immediately:

**MCLE Committee of the  
Supreme Court of New Mexico**  
Ms. Stacie Dobbins Strain,  
Administrator  
411 St. Michael Drive, Suite #6  
Santa Fe, NM 87501  
Phone: (505) 986-1200

actions were authorized by law. We note that the communications were initiated by D, were incident to service of the search warrant, and there was no attempt to discuss the merits or to discover any material fact. Consequently, there was no violation of Rule 7-104(A)(1).

The pertinent authority of law derives from several sources. The United States Supreme Court has held that a person does not have right to counsel during the execution of searches of blood, handwriting exemplars, hair, etc. *See, e.g., Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966). Search warrants and their execution are authorized by rule and statute, and finally, district attorneys' presence as legal advisors during the execution of a warrant is sanctioned by practice and can be salutary.

While the Panel concludes that the actions and communications by Attorney B during the service and execution of the search warrant upon Client D did not constitute a violation of Rule 7-104 of the Code of the Professional Responsibility, the Panel was very concerned about those actions and communications, and because of that concern, expresses the following caution to Attorneys B and C. Prosecuting attorneys are not exempted from the strictures of Rule 7-104(A)(1). Prosecuting attorneys, therefore, are not permitted to make communications with defendants known to be represented by counsel on the subject of the representation. *See, People v. Green*, 274 N.W.2d 448 (Mich. 1979). Obtaining evidence through a search warrant is well within the "subject of representation" by defense counsel of defendants in criminal cases as that phrase is used in Rule 7-104 (A)(1). The sources set forth above may in this instance provide the requisite authority of law. However, any further communications by Attorney B with Client D on the subject of the representation would have exceeded what is authorized by law under Supreme Court decisions and would in addition go beyond what is authorized under the Code of Professional Responsibility and the current Rules Governing the Practice of Law. There is also the danger that the execution of the warrant itself may elicit information from the defendant in a manner which could be construed as improper interrogation.

Moreover, there need not be a violation of Constitutional rights in order for there to be a violation of the Code of Professional Responsibility, and in particular, a violation of Rule 7-104(A)(1). The purpose of this rule is a serious one and is independent of the purposes of the Fourth or Fifth Amendments to the United States Constitution. That purpose is to shield an adverse party from improper approaches by opposing counsel and to preserve the effective functioning of the legal profession in which persons represented by counsel are entitled to rely upon their own attorneys for advice. *See, People v. Green*, 274 N.W.2d 448 (Mich. 1979). In *People v. Green*, the court found that there was a violation of Rule 7-104(A)(1) even though defendant's Constitutional rights were not violated.

In sum, while Attorney B's actions and communications in this instance did not rise to the level of a violation of the Code of Professional Responsibility, communications by prosecutors to an accused party may readily violate Rule 7-104(A)(1). Prosecuting attorneys should therefore exercise great caution with respect to their activities and communications during the service and execution of a search warrant upon a criminal defendant who is represented by counsel.

Furthermore, although in this instance Attorney B's communications with Attorney A's client accurately reflected the law, given the nuances of law and the obviously adversary position of defendants and prosecuting attorneys in criminal cases, prosecuting attorneys should also be very cautious about giving defendants advice on the law. While case law holds that the defendant does not

have a right to counsel during the service and execution of a search warrant for blood, handwriting exemplars, hair, etc., it does not deny to a district attorney or a police officer the discretion to permit the defendant to contact his counsel. The record in this case indicates that such contact would not have thwarted or in any way impeded the service and execution of the warrant.

8. Because the Panel of the Disciplinary Board does not find a violation of the Code of Professional Responsibility by Attorney B with respect to the actions and communications during the service and execution of the search warrant, the Panel did not reach the question of whether and to what extent Attorney C might share responsibility for Attorney B's actions and communications.

9. Each party shall bear his own costs of the proceeding.

The charges filed against Attorneys B and C are, therefore, dismissed.

## Flaschner Award

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district, civil, family, probate, traffic, juvenile, criminal, military, U.S. Magistrates and Bankruptcy courts.

Selection of the recipient will be made by the Flaschner Award Board, which comprises five judges. They are Frederic B. Rodgers of Breckenridge, Colo., Harriet P. Henry of Portland, Maine, Fredric A. Grimm, Jr., of Muskegon, Mich., Robert Beresford (Ret.) of San Jose, Calif., and Committee Chair Francis S. Moran, Jr. of Washington, D.C.

Previous recipients have included U.S. Bankruptcy Judge Barry Russell of Los Angeles in 1987, Robert D. Thompson, Chief Judge of the Family Court of Delaware in 1986, U.S. Magistrate Arthur L. Burnett, Sr. of the District of Columbia in 1985 and Col. Ronald B. Stewart, U.S. Army, of Ft. Knox, Ky. in 1984.

Nominations must be submitted on an official entry form, or a copy of one, to Staff Director Myra S. Moglowsky, 750 N. Lake Shore Dr., Chicago, Ill., 60611. For forms and further information, contact Ms. Moglowsky at (312) 988-5697.